

18 August, 2010

To: Management Plan Review Coordinator  
HIHWNMS 6600  
Email: [hihwmanagementplan@noaa.gov](mailto:hihwmanagementplan@noaa.gov)

Re: Hawaiian Islands Humpback Whale National Marine Sanctuary

The Ocean Mammal Institute, along with other organizations working to protect endangered humpback whales and other marine mammals, have become increasingly concerned about the lack of programs, regulations or other visible attempts by the Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS or Sanctuary) to protect humpback whales from several immediate threats to their welfare.

In order to assure protection and recovery of our ocean resources, a strong economy in Hawaii, and protect cultural resources, we respectfully request that the Sanctuary initiate rule-making procedures to apply within its boundaries. The Sanctuary must go beyond existing self-imposed limitations. Any educational campaign is only as good as the conservation efforts that underpin it. If there is no meaningful conservation there cannot be meaningful education. It is time for the focus of the Sanctuary to include protection of the marine resources. Only then will the Sanctuary be within the scope of the enabling legislation.

It's within the mission and authority of the Sanctuary to achieve the purposes of the National Marine Sanctuaries Act. Marine Sanctuaries are "...to maintain the natural biological communities in the national marine sanctuaries, and to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes". This Sanctuary may also enact additional rules for the management of resources, qualities and ecosystems of the Sanctuary which are of national significance.<sup>1</sup> Marine conservation law and policy today favor an ecosystem approach to conservation and management. Not only do humpback whales require specific protective rules, so do the coral reef systems, water quality and other aspects of Sanctuary critical habitat.

The following is a list of what we think are the most the most immediate and significant threats to whales in the Sanctuary.

## 1. SHIP STRIKES

The island of Maui sees well over one million passengers a year travel on tour boats to watch whales, snorkel, scuba and otherwise utilize the ocean resources within the Sanctuary (testimony of Pacific Whale Foundation to Sanctuary Advisory Council, 2002). Tour boats traveling at 10-30 knots are involved in the majority of collisions with endangered whales. Propellers slice whales as

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<sup>1</sup> The National Marine Sanctuaries Act, United States Code, Title 16, Chapter 32; the Hawaiian Islands National Marine Sanctuary Act subtitle C, title II, Pub. L. 102-587, as amended; Code of Federal Regulations Title 15, Chapter IX.

well as endangered and threatened sea turtles. Lammers, Pack and Davis ( in OSI Technical Report 2003-1, August 19, 2003 prepared for the HIHWNMS) suggest that less than one quarter of the boat/whale collisions are reported. They indicate that vessels hitting whales will most likely continue to increase unless steps are taken to mitigate the problem.

The Sanctuary held a workshop on managing vessel collisions with whales in 2003. Workshop attendees developed priorities and recommendations at that time. What has been done to effectively implement these recommendations over the last seven years? Nine whales were hit by boats in the Sanctuary in 2009; additionally there were four “unconfirmed” vessel strikes. If this represents less than one quarter of the collisions as the OSI Technical Report suggests, it means that at least 36 whales were possibly hit by boats in 2009.

On its website the Sanctuary states that it has an educational campaign to encourage vessels to go slowly (10 knots). However, this campaign is not at all visible and has not been effective. Other sanctuaries and national parks have speed limits to protect whales and NOAA itself instigated speed limits in certain areas to help prevent boat collisions with North Atlantic right whales. Mentioning an educational campaign on the website and holding a vessel management workshop in 2003 with no follow-up is not sufficient to protect whales from ship strikes. Rules and enforcement are needed to address this expanding problem.

## 2. ACOUSTIC IMPACTS

Whales in this Sanctuary are subject to acoustic impacts not only from boat engine noise but also from high intensity sonar and other noise produced by the U.S. Navy during exercises and war games. A small part of the Sanctuary overlaps the Hawaii Range Complex where naval exercises take place and noise from war games outside the Sanctuary can affect marine life inside Sanctuary boundaries.

In July, 2004 high intensity sonar used during RIMPAC war games resulted in a live stranding of melon-headed whales in Hanalei Bay. One whale died in the Bay. I was a member of the Advisory Committee on Acoustic Impacts on Marine Mammals at that time and this live stranding was one of the events we discussed. There have been several other suspicious strandings in and near the Sanctuary correlated with naval sonar exercises. Most recently, two dead humpback whales and thousands of dead fish washed up around Kauai in late January/early February, 2009 shortly after a sonar exercise was conducted. Has the Sanctuary investigated the cause of death of these whales and fish or requested necropsy reports? Has the Sanctuary investigated the cause of any whale stranding in the Sanctuary?

Daniel Basta, Director of the National Marine Sanctuary Program, issued an acoustic impact policy for all National Marine Sanctuaries in 2007 stating that Sanctuaries will use the tools and authorities at their disposal to prevent or mitigate acoustic impacts on Sanctuary resources. In January, 2010 Dr. Jane Lubchenco, Under Secretary of Commerce, issued a letter stating that NOAA concludes that “ongoing mitigation efforts, in our view, must do more” to address uncertainties and protect marine mammals from sonar impacts. The Sanctuary must comply with these NOAA noise policies.

Stellwagon Bank and the Channel Islands National Marine Sanctuary are doing research on acoustic impacts. Such a program is greatly needed in Hawaii but we see no evidence of Sanctuary initiated research on acoustic impacts or on other relevant issues threatening the whales.

### 3. REEF AND HABITAT PROTECTION

Hawaii's coral reefs are of national significance; they are in crisis and lack agency protections. Many variables demonstrate the alarming deterioration of these reefs especially those off Maui and located within the boundaries of the Sanctuary. Increased levels of nutrients and algae in the water, fewer large fish, fewer schools of fish, less diversified reef life and little to no growth in the reef all reflect deterioration. The Hawaii Department of Land and Natural Resources and University of Hawaii Botany Department have been tracking the deterioration of many of Maui's reefs by taking photos (CRAMP sampling) and water samples over the last 10 years.

Certain research sites within the Sanctuary have shown significant declines from 1998 through 2007, including Honolua Bay, Kahekili Park and Ma'alaea Bay. Reef decreased in the Kahekili Park study area from 55% in 1998 to 34% in 2007. Ma'alaea Bay within the Sanctuary is an example of coral reef collapse going from 75% to 4% reef cover in the same time period. Observers of the reefs around Maui report extremely low populations of all fish and in some areas fish populations are almost non-existent.

An area in the Sanctuary, directly viewable from the Sanctuary office in Kihei, is mentioned in a comprehensive article in the *LA Times* as an example of coral reefs being inundated and killed by plant life because of the increase in nutrients and lack of fish to graze on the algae and other plant life. This is part of the Ma'alaea Bay study area referred to above which shows reef collapse and invasive algae. Maui is losing this reef because of failure of the federal government, including the HIHWNMS, and state of Hawaii to prohibit destructive fishing practices and the dumping of vessel sewage. See the Series on Altered Oceans, by Kenneth R. Weiss, The Los Angeles Times, July 30, 2006.

NOAA's own studies state that algae blooms, fed by nutrients, are toxic to marine mammals. See Interim Best Practices Marine Mammal Stranding Response, Rehabilitation & Release, by Whaley & Borkowski, January 6, 2006. How will the Sanctuary address reef deterioration during the Management Plan Revision?

### 4. WATER QUALITY

Extensive science documents that at least six to ten million gallons of waste water is leaching from injection wells into ground water and then into Sanctuary waters around Maui every day (see Hunt and Rosa, U S Geological Survey Scientific Investigative Report 2009-5253). As a result the EPA has requested that Maui County develop a disinfection plan within one year.

The Hawaiian Islands Humpback Whale National Marine Sanctuary Act prohibits discharge of waste or deposit of any material that requires a federal permit into Sanctuary waters. The Clean Water Act prohibits the discharge of pollutants from point sources to waters of the U. S. except as

allowed under National Pollutant Elimination System Permits (NPDES). The County of Maui is allegedly discharging pollutants into waters of the U. S. without an NPDES permit. Therefore there is lack of compliance with both the Sanctuary Act and the Clean Water Act.

Waters in the Sanctuary have gone from Class AA designation (the highest standard) to Impaired Status since the inception of the Sanctuary in 1992. Locals encounter sewage slicks after tour boats dump sewage on their trips to Molokini and Makena "Turtle Town". Swimmers encounter human waste in the water. The popular grass roots "Pump Don't Dump Campaign" initiated in 2002 elevated water quality awareness around Maui and resulted in a program of tour boats at one harbor in the Sanctuary voluntarily pumping out waste. While the Sanctuary initially gave \$5000 to support this program after it was in place, it is no longer supporting it financially or trying to expand it. Instead a nonprofit organization had to take the responsibility of raising funds to keep the voluntary pumping program going at this one harbor. What about the other harbors in the Sanctuary? While the Sanctuary has the responsibility to stop dumping of sewage in Sanctuary waters, a grass roots group finally tried to do something about the floating feces after the Sanctuary ignored this health issue affecting both humans and whales for years.

The Sanctuary has a volunteer water monitoring program but there appears to be no specific Sanctuary funding to support it. Surfrider gave money for the necessary equipment and the Blue Water Task Force and Hawaii Tourism Authority funded supplies for the program. The Hawaii Wildlife Fund proposed a joint program with NOAA to partially fund a staff person to lead the water quality monitoring program and to train others but Sanctuary personnel refused to adopt that proposal. When will the Sanctuary actively participate in addressing the water quality issue by committing Sanctuary funds to it? Other Sanctuaries are able to find resources in their budget to address such critical issues.

The Maui County Council adopted a resolution in February, 2006 stating that "it is imperative that dumping of raw sewage and chemical contaminants into our ocean cease immediately, and that our precious marine ecosystem, which our residents and tourist industry cherish and depend on, be protected..." Additionally, a House Concurrent Resolution from the Hawaii State Legislature requested that the Sanctuary and certain state agencies prohibit the dumping of vessel sewage and treatment chemicals into Sanctuary waters (HCR 58 SD1, 2007). This Resolution asking for regulations protecting the water of the Sanctuary from vessel sewage passed both houses of the State Legislature without opposition. There also was extensive public support (from local and international environmental groups) and testimony for this Resolution. The Sanctuary never took action. Additionally the federal law cited in HCR 58 outlines the obligation of the Sanctuary to adopt rules that give protection to marine life. The Sanctuary has a legal obligation to do so. The EPA, the Hawaii State Legislature and the public expect and request the Sanctuary to take action.

## 5. MORE AGGRESSIVE ENFORCEMENT OF EXISTING LAW

The endangered humpback whales, Hawaiian monk seals and Hawksbill sea turtles are not blessed by conscientious enforcement of the Endangered Species Act<sup>2</sup> in Hawaii. Other areas of

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<sup>2</sup> Endangered Species Act, United States Code, Title 16, Chapter 35.

the United States have seen (sometimes controversial) active enforcement of laws designed to protect endangered species.<sup>3</sup>

It is unfortunate that the following actions in the Sanctuary have not resulted in Endangered Species Act or Marine Mammal Protection Act enforcement:

- tour boats which kill or maim endangered animals.
- deterioration of habitat important to endangered species, including breeding, calving, nursing and other critical habitat activities.
- dumping vessel sewage and other contaminants directly in the same critical habitat, sometimes when endangered animals are present.

A broad definition of “takes” pursuant to the Endangered Species Act has developed, and we ask that the Sanctuary and sister agencies within the Department of Commerce take responsible action to protect endangered animals and critical habitat within the Hawaiian Islands Humpback Whale National Marine Sanctuary and elsewhere around the Hawaiian Islands. Similar wording regarding takings is within the existing HIHWNMS rules, and could also be considered and applied for the actual protection of whales, critically endangered Hawaiian monk seals, Hawksbill sea turtles and other species considered endangered and threatened.

The Marine Mammal Protection Act also has expansive definitions to apply, where prohibited “harassment” includes actions that have the “potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding....”. Other federal statutes apply to our areas of concern, however, we do not see enforcement actions protecting the marine resources.<sup>4</sup>

## 6. THE BUDGET

A look at the sketchy budget indicates that about 78% of the budget goes for staff and contract labor. What does this extensive staff do to directly protect whales from immediate threats? Why is there no enforcement of the MMPA or the ESA when there are reports of sewage being dumped in the Sanctuary or when whales are injured or killed by tour boats? Only a sliver of the budget is spent on enforcement. That has to be because there are no existing rules to enforce. The only existing regulation that we can identify is the one which prohibits boats from approaching whales closer than 100 yards and this federal regulation was in place before the Sanctuary was formed.

The National Marine Fisheries Service and other Commerce agencies have the opportunity and statutory direction to enforce existing statutes, including the Endangered Species Act and Marine Mammal Protection Act to help alleviate the threats. The Sanctuary has the opportunity and

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<sup>3</sup> For example, National Marine Fisheries Service Biological Opinions have been written with the result of preventing irrigation of over 100,000 acres of private farm land located within the Klamath Project. This land is 100 miles upriver from the salmon sought to be protected.

<sup>4</sup> Marine Mammal Protection Act, United States Code, Title 16, Chapter 31; Marine Protection, Research, and Sanctuaries Act of 1972, United States Code, Title 33, Chapter 32, Magnusson-Stevens Fishery Conservation and Management Act (MFCMA) of 1976, United States Code, Title 16, Chapter 38.

Congressional direction to protect the marine resources and critical habitat and rules should be promulgated and enforced as requested above. Most importantly, the Sanctuary has the opportunity to provide real sanctuary to the marine life it is intended to protect.

Sincerely,

A handwritten signature in cursive script, reading "Marsha L. Green". The signature is written in dark ink on a white background.

Marsha L. Green, Ph.D.,  
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